

University of Dundee

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Ross, Andrea; Zasinaite, Agne

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The use of presumptions and duties in sustainable development equations: promoting micro-renewables and preserving historic buildings

Introduction

Under the Climate Change (Scotland) Act 2009, Scotland already has some of the most demanding greenhouse gas reduction targets in the world and is making progress.¹ Scotland met its 2014 interim target and is ahead of the UK as a whole in reducing greenhouse gas (GHG) emissions.² The Government's goal in imposing these targets is to transform Scotland's economy into one that is low carbon, fair, resilient, and sustainable however, unfortunately, while nationally and internationally impressive, the current targets fall short of what is actually needed to do so.³

To this end, the Scottish Government is introducing a new Climate Change Act with more ambitious targets including an overall reduction in GHG emissions by more than 50% relative to 1990 levels by 2020. By 2030 Scotland's electricity system is to be wholly decarbonised and supply a growing share of Scotland's energy needs. Moreover, Scotland's building stock is to be largely decarbonised by 2030.⁴

Scotland's climate change ambitions sometimes complement and sometimes contradict other public and private interests including: lifestyle and transport needs, the protection of landscapes, historic and cultural environment, current agricultural and forestry practices and the survival of certain industries. Sometimes the tensions align and lead to win-win-win scenarios. For example, many energy efficiency measures have environmental benefits of using less resources, economic benefits of reducing energy costs and social benefits of improving living conditions. However, more often decision makers need to prioritise and choose between interests. In the context of protecting and preserving the historic environment, the benefits of

*Author details and acknowledgements

¹ Climate Change (Scotland) Act 2009 aims to reduce emissions of greenhouse gases (GHGs) by at least 80% in 2050 relative to 1990, with an interim target to reduce emissions by 42% in 2020; Committee on Climate Change, Reducing Emissions in Scotland – Progress Report 2016 (September 2016) at 8.

² Ibid.

³ Ibid at 9.

⁴ Scottish Government, Draft Climate Change Plan - the draft Third Report on Policies and Proposals 2017-2032 <http://www.gov.scot/Resource/0051/00513102.pdf>

energy efficiency projects set out above may need to be balanced against the potential of the project to negatively impact on the historic or architectural interest of a building. For example, proposed wind turbines, solar panels, or flues may alter the appearance of an architecturally unique roof line, chimney or garden.

Balancing conflicting public interest goals including long term and short term interests is essential for sustainable development. As noted by Ross, sustainable development is best viewed as a framework or forum for sometimes complementary, but often conflicting, factors to be raised and the best solution found.⁵ This paper refers to this decision making process as the 'sustainable development equation'. However, decisions about what factors should be raised and the priority afforded to each in any given sustainable development equation can vary significantly among decision makers. The most widely accepted definition of sustainable development is 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' ('the Brundtland definition').⁶ This definition encourages discourse by bringing together different and conflicting interests however, it also allows a wide range of different interpretations to be considered legitimate.⁷ A popular approach seeks to advance three interdependent and mutually reinforcing pillars—economic development, social development and environmental protection at the same time⁸ thus promoting win-win-win scenarios. In reality, this can lead to 'business as usual'. By failing to prioritise ecological sustainability including the very serious threat presented by climate change, weak approaches to sustainable development allow 'short-termism' to prevail, with little or no consideration given to the Earth's limits, the needs of future generations or, indeed, the needs of the poorer members of the present generation.⁹

One way of addressing the tensions inherent in sustainable development equations is to prioritise certain factors by introducing legal or policy presumptions and duties to influence

⁵ A. Ross "It's Time to Get Serious—Why Legislation Is Needed to Make Sustainable Development a Reality in the UK"(2010) 2 *Sustainability* 1101 at 1105

⁶ World Commission on Environment and Development, *Our Common Future* (the 'Brundtland Report') (Oxford University Press, Oxford, 1987).

⁷ A Ross, "Sustainable development in Scotland post devolution", (2006) 8 *Env'l L Rev* 6.

⁸ UN, Plan of Implementation at the World Summit on Sustainable Development (Johannesburg), (UN: New York, 2002) para 2.

⁹ D. Helm, "Objectives, instruments and institutions", in D Helm (ed), *Environmental Policy Objectives, Instruments and Implementation* (Oxford University Press: Oxford, 2000) at 12; A Ross, *Sustainable Development Law in the UK - From Rhetoric to Reality* (Earthscan Routledge, Abingdon, 2012) chs 4 and 14.

decision makers in making certain decisions.¹⁰ For example, throughout the UK, buildings of special architectural or historic interest are known as ‘listed buildings’ and a legal presumption in favour of their preservation exists whereby ‘special regard is given to the desirability of preserving the listed building, its setting or any of its features of special architectural or historic interest.’¹¹ Moreover, in Scotland, the public bodies responsible for implementing the listed buildings regime are subject to legal duties to contribute to sustainable economic growth¹² and also to take climate change calculations into account when exercising their functions.¹³

This paper examines role of presumptions and duties in sustainable development equations. More specifically, it asks whether the regulatory regime for managing change in listed buildings is promoting and delivering the sustainable management of listed buildings. It does so by examining how the various legal and policy presumptions and duties set out above are used and prioritized by the courts, by Historic Environment Scotland (‘HES’) and local authorities in specific policy on managing change in listed buildings particularly in relation to micro-renewables projects and then in practice by local authorities in listed building consent decisions relating to solar panels as an example. Solar panel applications were chosen because they are highly visible and thus, can highlight where priorities lie in the sustainable development equation of a local authority.

‘Listed buildings’ are buildings of historic or architectural importance and are subject to additional regulatory controls beyond mainstream town and country planning.¹⁴ HES is the non-departmental public body that has responsible for listing, protecting, preserving and managing these buildings.¹⁵ Previously, responsibility for Scotland’s cultural heritage lay with an arm of the Scottish Government – ‘Historic Scotland’ (HS) and some policies continue to be under the old name. ‘Micro-renewables or micro-generation projects’ involve small-scale non-commercial renewables using zero or low-carbon technologies to provide heat, hot water and/or

¹⁰ Where appropriate, this paper sometimes will use the term ‘obligations’ to cover a wide range of presumptions, duties and objectives.

¹¹ Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 s. 14(2) and s.59; Listed Buildings and Conservation Areas Act 1990 s.16(2) and s. 66(1) (covers England and Wales but note amendments from Historic Environment (Wales) Act 2016); Planning Act (Northern Ireland) 2011 s.91(2).

¹² Regulatory Reform (Scotland) Act 2014 s.4

¹³ Climate Change (Scotland) Act 2009 s.44

¹⁴ Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (‘LBCASA 1997’), s.8(1)(a).

¹⁵ HES was established by the Historic Environment Scotland Act 2014 (‘HESA 2014’); its powers relating to listed buildings are set out in LBCASA 1997.

electricity’¹⁶ and include small scale wind, hydro-electric, solar, geothermal and biomass technologies. They can reduce energy consumption in buildings¹⁷ and this not only reduces demand on the public energy infrastructure, but can bring potential savings to owners and occupiers as they pay less for energy because they have their own renewable supply.¹⁸

This particular sustainable development equation is a worthwhile case study because it highlights how an established regulatory regime is adapting to deliver sustainable development. It explores how Scotland’s commitments to reducing greenhouse gas emissions are being balanced with an entrenched public interest duty, to preserve Scotland’s culturally significant historic environment, by those responsible for managing change in the historic buildings. This is a pressing issue in Scotland, as well as in many other parts of the UK and Europe. In 2014 Historic Scotland reported that ‘One fifth (19%) of [Scotland’s] 2.4 million housing stock is now more than 95 years old (traditionally built)’.¹⁹ To date efforts to reduce GHG emissions have focused on most easily obtained gains by widely promoting the benefits of energy efficiency measures such as draught exclusion, insulation and new boilers; increasing energy efficiency requirements in buildings standards and providing incentives for existing non historic buildings to install micro-renewables. The new targets will require more ambitious and more controversial change including projects on historic buildings. Indeed, as noted by Historic Scotland ‘the sensitive re-use of historic buildings is crucial if Scotland is to meet its 80% target for reducing carbon emissions by 2050.’²⁰

The paper begins by assessing the local, national and global importance of Scotland’s listed buildings and why effectively managing change is essential for their own and more broadly, for Scotland’s sustainable development. Drawing on previous research, the paper explores each of the duties and presumptions set out above in detail in the context of listed buildings regulation. It next considers how the duties and presumptions are used and reconciled in court in cases

¹⁶ Energy Act 2004, s.82(6). Renewable energy defined as ‘energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases.’ Per 2009/28/EC Directive on the promotion of the use of energy from renewable sources, Art.2(a).

¹⁷ J. Clarke et al., ‘The Role of Built Environment Energy Efficiency in a Sustainable UK Energy Economy’ (2008) 36 Energy Policy 4605, 4607.

¹⁸ F.J. Born et al. ‘On the integration of renewable energy systems within the built environment’ (2001) 22(1) Building Services Engineering Research and Technology 3.

¹⁹ Historic Scotland, Scotland’s Historic Environment Audit (‘SHEA’) (2014)

²⁰ Ibid.

involving change to listed buildings and then in UNESCO, Scottish Government and HES policy specific guidance on managing change, and more specifically micro-renewables projects, in listed buildings. A case study examines how the presumptions are interpreted local development plan policy on listed buildings in eight of Scotland's 32 planning authorities. This is followed by a review of listed building consents for solar panel projects in the studied authorities to establish how the various policies and presumptions are used in decision making about listed buildings in practice. The results are also used to infer how the law, national and local policy, and practice influence the behaviour of owners and potential developers to initiate such projects. The paper concludes presumptions and duties are useful tools for ensuring certain factors and challenges are brought into sustainable development equations and given the appropriate status. However, in the context of listed buildings, the current balance is not capable of delivering or encouraging their sustainable management. Both the law and policy for listed buildings needs to be more explicit about balancing the presumption in favour of preservation with other secondary obligations to secure the sustainable management of listed buildings and encourage their sympathetic modernization. More generally, the paper concludes that presumptions and duties are most useful when they are an express part of the sustainable development equations in specific regulatory regimes and where the policy that supports these sustainable development equations is sufficiently detailed to provide those applying and subject to the regime with reassurance and certainty.

The importance of sustainably managing listed buildings

Scotland has an impressive cultural heritage some of which is recognized as internationally significant.²¹ For example, Edinburgh's World Heritage Site comprises of two distinct areas: the Old Town dominated by a medieval fortress and the neoclassical New Town whose development from the 18th century has had a far-reaching influence on European urban planning.²² The

²¹ Scotland is home to six UNESCO World Heritage sites of outstanding cultural importance: the Old and New Towns in Edinburgh; New Lanark the heart of Neolithic Orkney; the Antonine Wall; St Kilda and the Forth Rail Bridge. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage ('World Heritage Convention') Arts.1 – 2: aim to protect and preserve cultural and natural heritage sites that have 'outstanding universal value', and have 'authenticity' and 'integrity'. The UK is also party to the European Convention on the Protection of the Archaeological Heritage 1992, the Granada Convention for the Protection of the Architectural Heritage of Europe 1985 and the European Cultural Convention Paris 1954, harmonising preservation efforts across all EU Member States.

²² UNESCO, RENFORUS 'Good Practices: Success stories on sustainable and renewable energies in UNESCO sites' (2014), 37.

significance of many other buildings is more local or national, providing evidence of a past way of life or a particular architectural feature or as a culturally significant meeting place. As explained in the Government Strategy, *Our Place in Time* protecting the cultural heritage is important for sustainable development as an end in itself: 'Scotland's historic environment is intrinsic to our sense of place and strong cultural identity....It enhances regional and local distinctiveness. It forges connections between people and the places where they live and visit.'²³ While no equivalent figures exist for Scotland, when asked about the importance of their historic places, 95% of adults in England agreed that 'when trying to improve local places it is worth saving their historic features'.²⁴

There are also instrumental reasons for sustaining the heritage.²⁵ As *Our Place in Time* explains: 'It helps to create a sense of place, identity and physical and social wellbeing, and benefits the economy, civic participation, tourism and lifelong learning. It is dynamic and ever-changing and that dynamism lies at the heart of the need for sound principles of stewardship.'²⁶ To put this in perspective, as noted previously, older buildings make up a significant part of the Scottish built environment and are at the heart of Scotland's cities and communities.²⁷ Across the whole of the UK, Hatchwell estimates that there are around 'six million pre-1919 domestic and nondomestic buildings including about 500,000 listed buildings.'²⁸ Moreover, the European Commission estimates that in 2011 there were 253,000 jobs in cultural and natural tourism in the UK and that its combined direct, indirect and induced contribution provided 742,000 jobs in 2014.'²⁹ As Licciardi and Amirtahmasebi observe 'businesses tend to locate in [historic city cores], as it is easier to attract specialists and expats to live and work in such places.'³⁰ This is in addition to non-economic benefits heritage provides, such as, amenity, artistic and educational value to communities.

Thus, for Scotland to continue to progress in a modern world, these buildings need to be kept in active use and with proper care, older buildings can age gracefully and retain their relevance.

²³ Scottish Government, *Our Place in Time - The Historic Environment Strategy for Scotland* (2014) 2-4

²⁴ Historic England *Taking Part, 2014/15 Focus on Heritage* (2015) 4.

²⁵ UNESCO, *Managing Cultural World Heritage* (UNESCO 2013) 20.

²⁶ Scottish Government, above n. 23 at 2.

²⁷ Historic Scotland, above, n.19

²⁸ P. Hatchwell, 'Adam Dudley Architects: Upgrading Historic Buildings' (2013) (*The ENDS Report*), 1.

²⁹ EC, *Getting Cultural Heritage to Work for Europe: Report of the Horizon 2020 Group on Cultural Heritage* (Directorate-General for Research and Innovation 2015), 6-7.

³⁰ G. Licciardi, and R. Amirtahmasebi, *The Economics of Uniqueness. Investing in Historical City Cores and Cultural Heritage Assets for Sustainable Development* (The World Bank 2012), xxiv.

Unfortunately, this is often not the case. Edinburgh World Heritage found 147 of the 202 buildings it surveyed (72%) were in need of some sort of repair and that a lack of attention to basic building maintenance was putting the city's UNESCO status at risk.³¹ More generally, the 2014 Scottish House Condition Survey has identified that 73% of pre-1919 buildings have some critical disrepair and 39% have critical and urgent disrepair.³²

The maintenance issues are compounded by the effects of climate change including: rising sea levels, increased storm events, erosion, rainwater penetration, flooding, increased biological growth and enhanced stone decay.³³ Historic Scotland's Climate Change Action Plan for 2012-17 (now the responsibility of HES) sets out a plan for improving the condition of the historic environment and reducing the number of historic buildings and monuments at risk, using climate change risk assessments, research and using this information to modify conservation strategies and target priority sites where necessary.³⁴

However, older buildings are also part of the problem. They are high consumers of energy³⁵ as energy efficiency measures were unlikely to have been considered in the design or the building stage. High energy consumption is unsustainable, socially, environmentally and economically. Inefficient buildings will be cold, uncomfortable and potentially unhealthy. They waste vital resources and will be unduly costly, sometimes prohibitively so, to run.

That said, it is possible to sensitively modernize listed buildings to be more sustainable. Fyall and Garrod observe that preservation and sustainable development principles can work well together as 'heritage and sustainability evidently share a common theme of inheritance.'³⁶ Indeed, UNESCO's RENFORCUS Initiative promotes the use of World Heritage Sites as observatories on the sustainable use of renewable technologies. As set out in its Good Practice Guide 'Contrary to popular belief, it is possible to reduce energy inefficiency in traditional

³¹ Edinburgh World Heritage is an independent charity with the aim of ensuring the city's World Heritage status is a dynamic force for good that benefits everyone. <http://www.ewht.org.uk/what-we-do> See BBC online 'Poor maintenance threatens Edinburgh World Heritage status' November 25, 2016 <http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-38106203>

³² Scottish Government, *Scottish House Condition Survey 2014* (2015) Table 44.

³³ Historic Scotland, *A Climate Change Action Plan for Historic Scotland 2012-17* (2011).

³⁴ *Ibid* at 63.

³⁵ P. Ekins and E. Lees, 'The Impact of EU Policies on Energy Use in and the Evolution of the UK Built Environment' (2008) 36 *Energy Policy* 4580, 4580.

³⁶ A. Fyall and B. Garrod, 'Heritage Tourism: At What Price?' (1998) 3 *Managing Leisure* 213, 214.

buildings, without compromising their authenticity'.³⁷ Interestingly the publication used projects in Edinburgh to highlight good practice.

In line with much of the literature, this paper refers to this balancing process as 'the sustainable management of listed buildings'. As explained by HES 'the challenge for sustainable management of the historic environment and how it contributes to the vitality of modern life, is to identify its key characteristics and to establish the boundaries within which change can continue so that it enhances rather than diminishes historic character.'³⁸ Hence, sustainable management is a form of sustainable development equation.

Sustainable development in Scotland – legal duties and policy presumptions

The Scottish Government defines sustainable development using the Brundtland definition. however, since 2007 has largely avoided the term.³⁹ Instead, the Scottish Government's adopted single purpose is set out in its *Economic Strategy* (the 'Strategy'): 'To focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth'.⁴⁰ 'Sustainable economic growth' is defined in planning policy as 'Building a dynamic and growing economy that will provide prosperity and opportunities for all, while ensuring that future generations can enjoy a better quality of life too.'⁴¹ This approach is reflected in the vision behind the *Our Place in Time*: 'Scotland's historic environment is understood and valued, cared for and protected, enjoyed and enhanced. It is at the heart of a flourishing and sustainable Scotland and will be passed on with pride to benefit future generations.'⁴²

In furtherance of this objective, the Government introduced the Regulatory Reform (Scotland) Act 2014 (RRSA 2014) which in s. 4 provides that in exercising its regulatory functions, certain public bodies must contribute to achieving sustainable economic growth, except to the extent

³⁷ UNESCO, n. 22, 7.

³⁸ Historic Environment Scotland, *Historic Environment Scotland Policy Statement* (HESPS) (2016), para 1.3.

³⁹ A. Ross 'The future Scotland wants – Is it really all about sustainable economic growth?' (2015) *The Edinburgh Law Review* 19(1), 66-100.

⁴⁰ Scottish Government, *Economic Strategy* (2015) 13; previously in (2007) para A.1; (2011) 12.

⁴¹ Scottish Government, *Scottish Planning Policy* (2014) Glossary.

⁴² Scottish Government, above, n.23, 2-4.

that it would be inconsistent with the exercise of those functions to do so.⁴³ Local authorities and HES are among the bodies subject to this duty.⁴⁴

Local authorities are also under an obligation to discharge their functions in a way that contributes to the achievement of sustainable development pursuant to s. 1 of the Local Government in Scotland Act 2003. Likewise, the Planning etc. (Scotland) Act 2006 s. 2 provides that local authorities in exercising their development planning functions must do so with the objective of contributing to the achievement of sustainable development. This legal duty only covers strategic plan making and does not cover decisions on individual applications for planning permission. However, a policy presumption in favour of sustainable development exists across the whole planning system which as set out in *Scottish Planning Policy* ('SPP') operates to support 'economically, environmentally and socially sustainable places by enabling development that balances the costs and benefits of a proposal over the longer term.'⁴⁵ Para 29 sets out a wish list of principles that include: supporting climate change mitigation and adaptation; and protecting, enhancing and promoting access to cultural heritage, including the historic environment. No guidance is provided on how to balance these principles in practice, leaving planning authorities to try to prioritise for themselves.

Additionally, the CCSA 2009 in s. 44 places a duty on public bodies, including local authorities and HES, to exercise their functions in the way best calculated to contribute to the delivery of climate change targets and deliver any climate change programmes. These duties are put in a wider context by an additional obligation to act in a way that it considers is most sustainable.⁴⁶ CCSA 2009 section 72 requires planning authorities to include greenhouse gas emission policies into local development plans. There are several other duties, notably relating to best value and biodiversity, but these are beyond the scope of this paper.⁴⁷

Thus, many public bodies in Scotland, including local authorities and HES, have responsibilities to promote sustainable economic growth and take climate change calculations into account.

⁴³ For a critique of this duty see Ross above n. 39.

⁴⁴ HES was added to Schedule 1 of the Regulatory Reform (Scotland) Act 2014 (Historic Environment Scotland Act 2014 (Ancillary Provision) Order 2015/271 (Scottish SI) art.8 (October 1, 2015)

⁴⁵ Scottish Government, above, n.41 paras 24-28

⁴⁶ CCSA 2009 S.44(1) (a)- (c)

⁴⁷ Local Government in Scotland Act 2003, s.1; Nature Conservation (Scotland) Act 2004 s. 1

However, for some public bodies these obligations may not align neatly with their primary functions or duties. Indeed, as described below this is the case in the listed buildings regime.

The law regulating development in listed buildings – the legal presumption in favour of preservation and the legal presumption in favour of the development plan

Listed buildings, like other buildings, are subject to planning legislation, but have additional provisions focused on preservation. Under the Scotland Act 1998, responsibility for town and country planning in Scotland is devolved to the Scottish Parliament and Scottish Government.

The Town and Country Planning (Scotland) Act 1997 ('TCPA 1997') s. 28(1) requires planning permission from the local authority (known as the planning authority) for any development of the land. Development encompasses any 'building, engineering, mining or other operations in, on, over or under land.'⁴⁸ This wide definition has numerous exceptions, for instance, works to the interior of the building that have no effect on the exterior.⁴⁹ Additionally, works falling under the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 ('GPD') receive permission automatically including certain micro-generation project. Listed buildings are expressly excepted from the benefits of these fast track provisions.

Planning authorities must produce development plans for their area.⁵⁰ This process is guided by a statutory objective to contribute to the achievement of sustainable development.⁵¹ In Scotland, the term 'development plan' includes local development plans (LDPs), strategic development plans (SDPs) (produced for the four main cities) and supplemental guidance (SG).⁵² In dealing with an application for planning permission the local authority must have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.⁵³ Additionally, TCPA 1997 s. 25(1)(a) provides that unless material considerations indicate otherwise, permission will be granted in accordance with the

⁴⁸ TCPA 1997, s. 26(1). See generally, N. Collar *Planning* 4th Edition (W. Green, Edinburgh, 2016)

⁴⁹ *ibid.*, s. 26(2)(a).

⁵⁰ *ibid.* s. 4(1); s. 16(1).

⁵¹ *Ibid.* s. 3E.

⁵² *ibid.* s. 24 (as well as older structure plans and local plans where they still exist) Note various changes to development plans in Scotland are being explored. Scottish Government, *Places, People and Planning: A consultation of the future of the Scottish Planning System* (January 2017).

⁵³ *ibid.*, s. 37(2).

development plan. This creates a legal presumption in favour of development that is in accordance with the development plan designed to promote a structured, plan-led system, while still allowing flexibility in decision making.⁵⁴ 'Material' is deemed synonymous to relevant,⁵⁵ and is restricted to considerations for the use and development of land, relevant to the particular application.⁵⁶ In contrast to the special status granted to the development plan (local policy), relevant national policy, such as the SPP and specific guidance from HES, are simply material considerations in all planning decisions including whether or not to grant planning permission or listed building consent.⁵⁷ The weight given to material considerations is at the discretion of the decision maker⁵⁸ and the decision will be upheld unless it was administratively unreasonable.⁵⁹

Thus, on its face, the planning system grants the decision maker, in most cases this is the local authority, a great deal of discretion. Rowan Robinson describes the planning system as a system of discretionary development control operated by local authorities within a framework of indicative policy guidance set by central government.⁶⁰ Yet, as indicated above, local policy in the form of the adopted development plan has a higher status than national policy. Central government retains some control on this otherwise decentralized system using its powers to call in applications and to hear appeals from aggrieved applicants following a negative planning decision.⁶¹

Responsibility for managing and protecting Scotland's cultural heritage is shared between the HES, the Scottish Government and local planning authorities. Under the HESA 2014 s. 2(1) HES has the general function of investigating, caring for and promoting Scotland's historic environment. In exercising its general function, HES has the following functions: (a) identifying

⁵⁴ *City of Edinburgh Council v Secretary of State for Scotland and Revival Properties* 1998SC (HL) 33; *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13.

⁵⁵ *Fairclough Homes & Rayford Properties v SoS for the Environment and Canterbury City Council* [1992] JPL 247.

⁵⁶ *Stringer v Minister of Housing & Local Government* [1971] 1 All ER 65.

⁵⁷ *Scottish Housebuilders Association v. Secretary of State for Scotland* 1995 SCLR 1039 at 1043E-F. Note, the recent consultation on planning in Scotland proposes changes to the status of the SPP and other national policy see Scottish Government n. 52.

⁵⁸ *Tesco Stores Ltd v Secretary of State the Environment* [1995] 2 All ER 636 (HL).

⁵⁹ *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223.

⁶⁰ J. Rowan Robinson, A. Ross, W. Walton 'Sustainable development and the development control process' (1995) 66(3) *Town Planning Review* 269 at 271.

⁶¹ Collar, above n.48 at 18.

and recording; (b) understanding and interpreting; (c) learning about, and educating others about; (d) protecting and managing; (e) conserving and enhancing the historic environment.

As such, the priority for HES as set out in its founding legislation is clearly the preservation of the historic environment. There is no specific mention of the statutory obligations relating to sustainable economic growth or climate change obligations discussed above nor any specific reference to sustainable management. Arguably the words managing and enhancing could be interpreted to cover some of these factors and under s. 2(8) HES must have regard (a) to any relevant policy or strategy published by the Scottish Ministers, and (b) as may be appropriate in the circumstances, to the interests of local communities but neither are the same as sustainable management.

Certain buildings of historic or architectural importance are subject to additional controls after they are 'listed' by HES.⁶² The LBCASA 1997 s. 1(1) places a duty on HES to compile a list, upon the guidance of planning authorities, of buildings of special architectural or historic interest. HES divides the buildings into three non-statutory categories: A - buildings of national or international importance (about 8% of total listed buildings); B – regional importance (about 50% of total) and; C – local importance (about 42% of total).⁶³

The listing process under the LBCASA 1997 considers only the special or architectural interest of the building in listing and factors such as current condition, implications for future use or financial issues are not relevant in considering whether a building should be listed.⁶⁴

Any works to the interior or exterior of listed buildings which may affect their special architectural or historic interest, are not permitted without permission.⁶⁵ Consequently, any development requires special authorisation from the planning authority, called a listed building consent ('LBC').⁶⁶ The planning authority must consult HES where the application is submitted

⁶² LBCASA 1997, s.8(1)(a).

⁶³ Historic Scotland, above n.19 at para 25.

⁶⁴ HES, above n.38 at para 2.24. Likewise, the designation of Special Protection Areas under the Directive on the Conservation of Wild Birds (the Birds Directive) 79/409/EEC is solely based ornithological criteria and this process has been criticised for its failure to include any socio-economic balancing. See C.T. Reid *Nature Conservation Law* 3rd ed (W. Green, Edinburgh 2009) 322.

⁶⁵ LBCASA 1997, s.6.

⁶⁶ *ibid*, s.7. Even for works on a roof that is only visible from air, *Burroughs Day v Bristol City Council* [1996] EGCS 10.

by the authority itself or is for the demolition of a listed building or for works to a Category A or B listed building.⁶⁷ If the authority wishes to grant LBC contrary to the advice of HES the authority must notify the Scottish Ministers of that intention. This gives the Scottish Ministers the opportunity to consider calling in the application to decide themselves. In the main however, the power to issue LBCs for development on listed buildings remains with the local authority,⁶⁸ along with all the enforcement powers.⁶⁹ There is a right to appeal a refusal of LBC or the imposition of certain conditions to the Scottish Ministers.⁷⁰

In determining LBCs and planning applications ss. 14(2) and 59 of LBCASA 1997, respectively, place a duty on the planning authority and the Scottish Ministers to have 'special regard to the desirability of preserving a listed building, or its setting, or any features of special architectural or historic interest which it possesses.' The legislation defines 'preserving' to mean 'preserving [a listed building] either in its existing state or subject only to such alterations or extensions as can be carried out without serious detriment to its character'.⁷¹ The words 'special regard' denote the importance of this consideration for planning authorities and HES and as discussed below, the case law supports a strong presumption against changes to listed buildings or their setting,⁷² referred here to as the 'presumption in favour of preservation'. There is no mention of 'sustainable management' in the legislation.

Internationally designated sites in Scotland are managed in a similar way as the rest of the historic environment by HES as the Convention's aims to preserve these sites is similar to that set out in the listed building legislation.

Prioritising the presumption and duties

Thus, the sustainable development equation for those responsible for managing change in listed buildings is subject to the influence of a plethora of presumptions and duties. To summarise, the legal objective of the development plan making process is to contribute to the achievement of

⁶⁷ Planning (Listed Building Consent and Conservation Area Consent Procedure) (Scotland) Regulations 2015, reg 7.

⁶⁸ *ibid*, s.9(1).

⁶⁹ *ibid*, ss.34 - 41.

⁷⁰ *Ibid* s.18.

⁷¹ *ibid*. s.14(3).

⁷² *Forest of Dean DC v Secretary of State for Communities and Local Government* [2016] EWHC 421 (Admin).

sustainable development and there is a legal presumption in favour of development that is in accordance with the development plan. A policy presumption in favour of sustainable development runs across the whole planning system. Local authorities must discharge their duties in a way that contributes to the achievement of sustainable development. They are also expected in exercising their functions to take climate change calculations into account and act sustainably. In many ways, these duties and presumptions are all very similar and can be reconciled quite easily.

Then things become a bit more muddled. Local authorities and HES must contribute to achieving sustainable economic growth, except to the extent that it would be inconsistent with the exercise of their functions to do so.⁷³ Ross notes that sustainable economic growth duty does not necessarily sit comfortably with the others described above.⁷⁴ Indeed on its face, it explicitly favours the economic pillar of sustainable development. That said, the duty does not apply to a regulator subject to another duty that has the same effect.⁷⁵ Indeed given its vague meaning, the number of qualifications to it and related duties, in evidence, several public bodies stated that they believed the duty would have very little impact on their actions or decision-making.⁷⁶

LBCASA 1997 contains a primary duty to have ‘special regard to the desirability of preserving a listed building, or its setting, or any features of special architectural or historic interest which it possesses.’ (the presumption in favour of preservation) in the determination of LBC and planning applications. Often secondary duties are explicitly set out in regulatory regimes to ensure decision makers take into account other factors when making their decisions. Reid describes these secondary provisions as ‘balancing obligations’ and public bodies, as creatures of statute, are only permitted to exercise those powers and functions granted to them in legislation.⁷⁷ However, LBCASA 1997 makes no mention of any of the other (secondary) duties or to the sustainable management of listed buildings as described in both UNESCO and HES policy.

⁷³ RRSA 2014 s. 4(1).

⁷⁴ Ross above n.39 at 92.

⁷⁵ RRSA 2014 s.4(5).

⁷⁶ Scottish Parliament, Economy, Energy and Tourism Committee, 11th Report, 2013 (Session 4): Stage 1 Report on the Regulatory Reform (Scotland) Bill, SP Paper 399 (Web Only), EET/S4/13/R11, at col 2933.

⁷⁷ Reid n.64 above at 60.

Thus, the only legal obligations that can legally be used to challenge the presumption in favour of preservation are contained outside the listed buildings regime in generally applicable statutes. It is becoming increasingly popular for governments to impose balancing duties across public bodies in more general statutes.⁷⁸ Arguably, it is hugely symbolic for a duty to apply to all activities of government and a duty's importance and status is raised by the fact that it applies across government. Application across government also highlights the cross cutting nature of a particular goal and can be used to promote joined up action across government. Finally, the duty ensures all public bodies are responsible for an objective and it gives them the power to act to meet this objective. In order to assess the potential of these duties to promote change we need to better understand how these duties operate in practice and how they relate to primary duties contained in specific legislation.

As court decisions set out the broad parameters within which policy and decision makers can lawfully act, it makes sense to begin by examining how the courts have interpreted and balanced the various presumptions and duties.

Prioritising the presumptions and duties in court

Each of the duties set out above are directory duties which do not tend to create rights per se ⁷⁹ and it is unlikely that the courts would accept, for example, an action for breach of the statutory duty to contribute to the delivery of climate change targets. Moreover, none of the statutes referred to above create a statutory right of appeal for a public body's failure to comply with a duty.

As such, the only way to challenge a public body's failure to take into account a relevant duty in court would be to bring an action for judicial review. Possible grounds include: a failure to take into account a relevant consideration or taking into account an irrelevant one; a fettering of

⁷⁸ See Northern Ireland (Miscellaneous Provisions) Act 2005 s. 25; CCSA 2009 s.44; RRSA 2015 s. 4; Wellbeing for Future Generations Act 2015 s.4.

⁷⁹ *Calveley v Chief Constable of Merseyside Police* [1989] AC 1228; Rubin, E. 'Law and legislation in the administrative state', (1989) *Columbia Law Review*, vol 89, 369.

discretion by rigidly applying a policy; a failure to have regard to legitimate expectations; and conduct or decision making that is so unreasonable no reasonable body would do it.⁸⁰

Each of the above, as relevant legal duties or significant policy presumptions, warrant treatment as material considerations by the decision maker. Where there is more than one material consideration, decisions need to be made about the weight and the priority to be afforded each consideration. All the legal duties set out above use mandatory language. In *R (Thornby Farms Ltd) v Daventry DC and R (Murray) v Derbyshire CC*, the English Court of Appeal held that ‘an objective which is obligatory must always be kept in mind when making a decision even while the decision maker has regard to other material considerations’.⁸¹ Bell notes that in practice, a decision maker need only state that any relevant decision has been taken with the objectives in mind and specify which considerations have been taken into account.⁸²

To date, there have been no cases where the courts have been asked to decide if a public body has failed in its duty to take climate change calculations into account in exercising its functions and the duty to contribute to sustainable economic growth only was introduced in 2015 so it is unsurprising that there is no caselaw on it.⁸³

However, over the years, the courts have been very clear about the influence of the presumption in favour of preservation in listed buildings and its importance relative to other factors including climate change mitigation. In *R (on the application of Barnwell Manor Wind Energy Ltd) v East Northamptonshire DC ('Barnwell')*⁸⁴ a wind farm was proposed near a Grade I (English equivalent to Cat A) listed building. The permission was overturned because the court found that the planning inspector did not place ‘considerable weight’ on the statutory duty to preserve the listed building and gave too much weight to policy guidance promoting renewable energy. The court in *South Lakeland DC v Secretary of State for the Environment*⁸⁵ clarified that ‘preserving’ means doing no harm while that in *R (Forge Field Society and others) v Sevenoaks DC*⁸⁶ held that

⁸⁰ See generally, W. Wade and C. Forsyth *Administrative Law*, 9th edition, (Oxford University Press, Oxford 2004); *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

⁸¹ [2002] EWCA Civ 31; [2002] Env LR 28. Note as the law across the UK is very similar, decisions from other UK jurisdictions are very persuasive in Scotland.

⁸² S. Bell, ‘Statutory pollution prevention objectives: Are they rules or aims?’, (2003) 15(1) *JPL*, 59-85

⁸³ Westlaw searches failed to bring up any substantive cases on either of these provisions.

⁸⁴ [2014] EWCA Civ 137.

⁸⁵ [1992] 2 AC 141.

⁸⁶ [2014] EWHC (Admin) [55] (Lindblom J.)

a balancing exercise is not enough to satisfy the duty. Any harm, even if limited or less than substantial, will be a considerable barrier to allowing development and alternative options should be considered. The court in *R (on the application of Garner) v Elmbridge BC*,⁸⁷ added that this preservation duty is different from ‘mere’ material considerations and its weight cannot be varied in the same way as normal planning applications.⁸⁸

In relation to World Heritage and other internationally protected sites, the court in *Bath Society v Secretary of State* held that ‘the duty [...] is of particular importance where the site concerned is of such universal value that protecting it is the concern of all mankind’.⁸⁹ However, the treaty protection only adds strength to the existing obligation and does not introduce a separate duty.⁹⁰

The presumption in favour of preservation has also been explicitly tested against the broader policy presumption in favour of sustainable development in planning. In *Forest of Dean DC v Secretary of State for Communities and Local Government*⁹¹ the English court held that the presumption in favour of sustainable development in planning policy does not apply or is restricted when preservation of listed buildings is concerned.

The House of Lords in *Lakeland* accepted that ‘in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest.’⁹² While there has been no successful public interest case involving climate change mitigation, other public interest grounds have been successful. In *Glasgow District Council v SoS for Scotland*⁹³ alterations to a listed bank building were allowed, because they improved operational efficiency and services offered to the public, and accommodated the staff. Similarly, *R (on the application of Chilton) v Babergh DC*⁹⁴ significant local employment prospects outweighed the harm to the listed building.

⁸⁷ [2011] EWHC 86 (Admin); at [8], upheld on appeal [2011] EWCA 891 (Ouseley J).

⁸⁸ Also see *Barnwell* (n 65) per Sullivan LJ at [29]. Also, *St Luke the Evangelist, Maidstone, Re* [1995] Fam 1 (Arches Ct) placing the same requirement for listed churches and *Heatherington (UK) Ltd v Secretary of State for the Environment* (1994) 69 P & CR 374.

⁸⁹ See *Bath Society v Secretary of State* [1991] 2 PLR 51 per Stocker LJ at [66] ‘the duty [...] is of particular importance where the site concerned is of such universal value that protecting it is the concern of all mankind’.

⁹⁰ C. Mynors ‘Working with the heritage: the new rules’ [2006] *JPL Dec Supp* (Planning: The Changing Climate?) 22 at 43.

⁹¹ [2016] EWHC 421 (Admin).

⁹² *South Lakeland DC v Secretary of State for the Environment* [1992] 2 AC 141, 146 (Lord Bridge). Note the House of Lords has been replaced by the Supreme Court as the highest civil court for the whole of the UK.

⁹³ 1993 SLT 1332.

⁹⁴ [2014] EWHC 3261 (Admin).

Thus, for the courts the explicit presumption in favour of preservation set out in the listed buildings legislation outweighs the other duties and presumptions in this particular sustainable development equation. Only very exceptionally, can it be overridden other public interests and these tend to be economic. To date, climate change mitigation and sustainable development interests have not been considered significant enough to warrant such treatment. The decisions are consistent with normal rules of interpretation whereby the court is simply giving priority to a specific legal provision in listed buildings legislation over a policy presumption and more general legal duties on public bodies. They do however, call into question the value of secondary duties set out in generally applicable statutes or policy as opposed to those expressly included in a given regulatory regime. LBCASA 1997 fails to provide any mechanism for balancing the preservation of listed buildings with their long term sustainable management and the obligations imposed outside LBCASA 1997 are virtually ignored by the courts. To conclude, the law on managing change in listed buildings as currently worded and applied by the courts is not promoting their sustainable management.

Prioritising the presumptions and duties in policy on managing change in listed buildings

A restrictive view of these court decisions leaves those responsible for the management of cultural heritage left to narrowly focus on preservation, rather than enhancement and broader sustainable development themes including climate change mitigation. Policy and practice must operate within the parameters of the law. Yet, as recognised by HES the reality is that 'listed buildings will however, like other buildings, require alteration and adaptation from time to time if they are to remain in beneficial use, and will be at risk if such alteration and adaptation is unduly constrained.'⁹⁵

Moreover, HES and local authorities cannot simply ignore the generally applicable statutory obligations relating to climate change mitigation and sustainable development. The existence of these duties create moral or societal expectations and a failure to act in accordance with these provisions could very easily result in criticism from the Scottish Government, the media, interest groups, or the general public.

⁹⁵ HESPS above n.38, para 3.39.

Thus, in trying to deliver on their duties and presumptions relating to sustainable development and climate change as well ensure the long term active use of listed buildings, those responsible for managing the historic environment are faced with the challenge of developing policy and practical solutions which mitigate harm to the architectural or historic interest of the listed building and avoid any conflict with the presumption in favour of preservation.

This section examines how the policies of UNESCO, Scottish Government, HES and certain local authorities balance change to listed buildings with their preservation and consider whether these policies are capable of promoting the long term sustainable management of listed buildings.

International and national policy

Relevant international and national policy, from UNESCO, the Scottish Government and HES, is a material consideration in planning decisions including LBC applications. Both the legal presumption in favour of preservation and the legal presumption in favour of development that accords with the development plan have a higher status in decisions about listed buildings.

UNESCO's publication *Managing Cultural World Heritage* recommends states take a combined approach to complying with the requirements of the Convention: 'on one hand, reaffirming the cultural value ... and on the other hand, exploring the conditions that would make heritage a powerful contributor to environmental, social and economic sustainability, with its rightful place as a priority in global and national development agendas.'⁹⁶ Specific policy on *Climate Change and World Heritage* now considers climate change mitigation as part of the measures for conservation.⁹⁷ UNESCO's RENFORCUS Initiative promotes the use of World Heritage Sites as observatories on the sustainable use of renewable technologies.⁹⁸

The Scottish Government's priorities for the operation of the planning system and for the development and use of land are very explicitly set out in the SPP⁹⁹ which as noted earlier reflects the Government's overall purpose and extends the presumption in favour of sustainable

⁹⁶ UNESCO, above n.25 at 7 and 20.

⁹⁷ UNESCO World Heritage Centre, *Climate Change and World Heritage* -World Heritage Report 22, (2007) 37-40.

⁹⁸ UNESCO, above n.22.

⁹⁹ Scottish Government, above n.41.

development to the whole planning system.¹⁰⁰ The SPP also contains specific guidance on how to balance change to and preservation of historic places. Para 137 states that the planning system should 'enable positive change in the historic environment which is informed by a clear understanding of the importance of the heritage assets affected and ensure their future use.' While para 141 emphasises that the preservation of the special architectural or historic interest of the building is the utmost important consideration, paragraph 142 provides that minimum development 'may be acceptable where it can be clearly shown to be the only means of preventing the loss of the asset and securing its long-term future.'

Overall, the SPP does not challenge the strict statutory presumption in favour of preservation found in the LBCASA 1997.¹⁰¹ Indeed, stating that change is not prevented,¹⁰² does not encourage or promote sustainable management.

More specific guidance for the day-to-day management of the historic environment can be found in the *Historic Environment Scotland Policy Statement* (HESPS).¹⁰³ The preservation of heritage assets is emphasised,¹⁰⁴ however, HESPS provides that 'sustainable management practices recognise that the protection and management of the historic environment is best carried out in balance with the surrounding environment, not in isolation from it.'¹⁰⁵

The approach is made instrumental in HES' specific guidance: *Managing Change in the Historic Environment* including one on *Micro-renewables* ('HESMG') and a Short Guide on Micro-Renewables in the Historic Environment.¹⁰⁶ The HESMG promotes and supports the use of renewable energy as long as 'the character of the historic building or place can be protected through careful siting and design.'¹⁰⁷

¹⁰⁰ *ibid.* paras 24-28. As explained above the English Courts have held that a similar policy presumption does not apply to listed building decisions *Forest of Dean DC v Secretary of State for Communities and Local Government* [2016] EWHC 421 (Admin).

¹⁰¹ *Ibid.* para 142.

¹⁰² *Ibid.* para 28.

¹⁰³ HES above n.38; It is similar to its predecessor: Historic Scotland on behalf of Scottish Ministers, *Scottish Historic Environment Policy* (2011).

¹⁰⁴ *ibid.* para 1.9 b restates the presumption in favour of preservation.

¹⁰⁵ *ibid.* paras 1.2 and 1.8

¹⁰⁶ HES *Managing Change in the Historic Environment - Micro-renewables* (June 2016); Historic Scotland, *Micro-Renewables in the Historic Environment Short Guide* 8 (March 2014).

¹⁰⁷ *ibid.* 4.

The guidance also acknowledges that many historic buildings lend themselves well to some form of micro-renewable energy generation however, energy efficiency measures should be considered first. It emphasises that micro-renewables should be planned carefully to minimize intervention affecting the historic character of the building while balancing the potential of available renewable energy sources¹⁰⁸ and offers detailed suggestions as to how to make different types of micro-renewables work for listed buildings. For example, in relation to solar power it suggests

Solar collectors can be installed on pitched or flat roofs, or may be integrated into the roof so that they are flush with its surface. ...For the integrity of the building, it is usually desirable to mount panels over existing slates.... Installation of solar panels on the principal elevation of a historic building should be avoided because of the detrimental visual impact. ... Alternative solutions should be explored, such as installation on secondary roof slopes, on locations hidden from main views, or on surrounding areas such as sheds, gardens or fields. Panels have been successfully installed behind parapet walls or on the south-facing inside rise of M-shaped roofs.¹⁰⁹

This detailed guidance pushes the boundaries of the strong preservationist approach reflected in the legislation, caselaw and SPP and demonstrates an understanding by HES that Scotland needs all its buildings to be functional and energy efficient. It also offers owners and developers some clarity as to what types of projects are acceptable and what are not acceptable.

Local Development Plan Policy

The most important local planning policy is contained in the development plan. As noted previously development plan policy has a special status in Scottish planning law such that there is a presumption in favour of development in accordance with the development plan¹¹⁰ and development plan policies must be explicitly identified, interpreted and considered against other material considerations in decision making.

¹⁰⁸ *ibid*, 4.

¹⁰⁹ *ibid*. 9.

¹¹⁰ TCPA 1997 s. 25(1)(a); *Edinburgh City Council v Secretary of State for Scotland*, 1998 SLT 120; but note also *Tesco Stores v Dundee City Council* [2012] UKSC 13 where development plan policies should not be read as if they are statutory provisions.

In Scotland, the development plan includes the strategic plans for the four main cities and local development plans (LDPs) or local plans until these are replaced by LDPs as well as adopted supplemental guidance (SG). A review of LP/LDP and SG policy in eight of Scotland's 32 unitary (planning) authorities found that every authority studied had included specific policies on renewable energy and micro-generation in their development plans¹¹¹ and these tended to be quite similar. Generally, these micro-renewables policies support all types of renewable energy projects with the caveat that they do not cause significant harm/ unacceptable adverse impact to the local environment, including landscape character and the character and appearance of listed buildings and conservation areas.¹¹² By focusing on mainstream buildings and projects these policies leave it to the listed buildings policy to balance the drive for renewables against the presumption in favour of preservation.

In contrast, the review found significant variation among listed buildings policies in the studied local authorities reflecting very different priorities.¹¹³ The Aberdeen City LDP provides that proposals affecting Conservation Areas or Listed Buildings will only be permitted if they comply with the SPP.¹¹⁴ Other LP /LDP policies on alterations to listed buildings are very negatively worded and strongly adhere to the presumption in favour of preservation. For example, Aberdeenshire LDP provides that there will be a presumption against development that would have a negative effect on the quality of these historic assets. Moreover, the relevant SG provides that 'we will refuse planning permission and/or listed building consent for any works, ..., which would have a detrimental effect on their character, integrity or setting...'¹¹⁵

Others are much more positive about change but are vague and provide very little guidance as to what is or is not acceptable. For example, in Dundee if your property is a listed building or is

¹¹¹ The eight studied authorities represented both urban and rural areas, and included the four major cities and Edinburgh as a World Heritage Site as well as covering the country geographically Aberdeen City, Aberdeenshire, Dumfries and Galloway, Dundee, Edinburgh, Glasgow, Highland and Perth and Kinross.

¹¹² For example, Aberdeenshire LDP 2012, C2; Perth and Kinross LDP 2014, ER 1A; Dumfries and Galloway LDP 2014, Policy IN1; Edinburgh LDP (second proposed June 2014) RS 1.

¹¹³ A. Ross 'Sustainable Development in policy and practice: the placing of solar panels on listed buildings in Scotland' *Environmental Law and Management* (forthcoming).

¹¹⁴ 2012, D5.

¹¹⁵ 2012, Policy13. Similar provisions are contained in the proposed Aberdeenshire Local Development Plan 2016 HE1.

in a conservation area, the installation of micro-renewables may be possible, provided particular attention is paid to design and positioning.¹¹⁶

In contrast, both Edinburgh and Glasgow encourage the sensitive alteration and extension of listed buildings where this will not harm their special interest and then provide very detailed guidance on what types of projects may or may not be permitted. For example, the Edinburgh SG provides that [renewable energy technologies] should not be visible from public view and may be acceptable in the following locations: on the ground to the rear of the building; on a modern extension to the rear of the building, providing that no part is higher than the main building and in the internal valley of a roof, provided that no part projects above the ridge.¹¹⁷

Thus, much of the specific policy on micro-renewables in listed buildings set out in LDPs acknowledges that change is possible in listed buildings and expressly encourages the sustainable management of listed buildings. It allows for a more nuanced version of the sustainable development equation than that used by the courts. That said, significant variation exists particularly among local authorities and as a result, similar applications for micro-renewables projects on listed buildings may be dealt with very differently across Scotland.

Prioritising the presumptions and duties in practice

This section explores how local authorities reconcile the presumption in favour of preservation in the listed buildings legislation with the need to ensure the long-term sustainable management of listed buildings in their area and, more specifically, meet their statutory obligations relating to preservation, climate change, sustainable development and sustainable economic growth. It is based on the findings of a study of LBC decisions for projects involving the placement of solar panels in eight planning authorities over a five and a half year period. The timeframe of January 1, 2011 to July 19, 2016 was chosen for 2 main reasons. First, it is two years following the passage of the Climate Change (Scotland) Act 2009 and the impact of the climate change

¹¹⁶ Dundee Local Development Plan, SG: Householder Development - Advice and Best Practice undated, para 3.8. See also Perth and Kinross LDP 2014, HE3; Dumfries and Galloway LDP 2014 HE1.

¹¹⁷ City of Edinburgh Local Plan (2010), Rural West Edinburgh Local Plan (2011) City of Edinburgh Council Listed Buildings and Conservation Areas Supplemental Guidance, (February 2016); Glasgow City Plan 2 (2009), DES 3. Note that the Edinburgh Local Development Plan (second proposed June 2014) and proposed Glasgow City Development Plan (submitted to SM June 2015) contain similar provisions.

obligations ought to have had time to take effect. Also, it is only post 2011 that policy linking historic buildings and climate change mitigation had been explicitly produced.¹¹⁸ Decisions prior to 2011 would be expected to be less likely to explicitly balance the presumption in favour of preservation with any climate change mitigation.¹¹⁹

Online searches revealed that only 135 LBC applications involving solar panels were recorded during the study period in the eight authorities studied. This figure is tiny given the fact that there are approximately 47,430 listed buildings across Scotland.¹²⁰ Moreover, the overall figure hides significant variations between local authorities. Many of the applications are in the more rural councils of Aberdeenshire, Dumfries and Galloway, Highland and Perth and Kinross. Indeed, none of the Perth and Kinross applications are within the boundaries of Perth itself. Moreover, given their populations, the cities and, most notably, Glasgow, Aberdeen and Dundee received very few applications for LBC relating to solar panels.¹²¹

That said, the overall success rate is positive at about 61.5%. However, once again there is significant variation between authorities. To better understand how authorities balance presumptions and policies a qualitative review of 67 LBC decisions was conducted.¹²²

The study found that the authorities with the most detailed and prescriptive development plan policies (Edinburgh and Glasgow) were most likely to rely entirely on these policies and did not tend to refer to national policy including HES' detailed policy on microgeneration. In contrast, the authority whose development plan policy suggested little or no opportunities to overcome the presumption in favour of preservation, Aberdeenshire, had a higher than average number of applications. Its decisions almost always referred to the more permissive and detailed HES policy. The findings are less consistent for those authorities with positive but vague development plan policy. Overall, these authorities referred to HES policy in about half of their decisions. In, Perth and Kinross the chance of success was considerably higher when the authority referred to HES policy in its decision. Overall, the chance of a positive decision is often,

¹¹⁸ Historic Scotland n.106 above.

¹¹⁹ Further methodological details can be found in Ross above n.110.

¹²⁰ Historic Scotland above n.106 at 4.

¹²¹ There were only 2 private applications in Aberdeen City

¹²² For this part of the study, all refusals and withdrawals were examined along with a maximum of 5 grants of LBC from each authority. Most of the information was set out in the decision letters and handling reports for each application but other documents were examined where necessary. See Ross above n.113.

but not always, more likely when it can be shown to comply with more detailed and prescriptive policy.

In practice, most LBC applications for solar panels are successful and many are granted with conditions. Often applications that have been refused or withdrawn are given alternative suggestions on how to make their application acceptable.¹²³ The system is capable of delivering an appropriate balance between the preservation and modernisation aims. However, the success rates vary between authorities and this reflects differences in priority between authorities. Indeed, one authority was very negative about these projects. More generally, there is some evidence to suggest that authorities tend to prefer to rely on prescriptive policies to justify their decisions especially grants of LBC. So, for example, the authorities with permissive yet prescriptive policy in their development plan relied almost exclusively on it while the authority with the most cautious development plan policy relied more on the detailed HES policy in their decisions and had a strong success rate.

Despite of the positive success rate, the system is failing to deliver and promote the sustainable management of listed buildings. If Scotland is serious about reducing its greenhouse gas emissions from its built environment, more applications need to come forward. This study has revealed that across eight planning authorities in five and a half years only 135 applications have been made for LBC for solar panels. This is indicative of a much wider problem. Notwithstanding the Scottish Government's commitment to mitigating climate change and promoting renewables, the number of buildings with solar panels in Scotland remains low with only 45,000 homes and a further 1000 commercial properties with roof-top solar panels.¹²⁴ Thus, it is unsurprising that this trend is also true for listed buildings. Those in the preservation lobby would say rightly so. However, owners of such buildings are likely to have more to gain from improving the energy efficiency of their buildings and it may be very worthwhile for them to find ways of doing so which protect the historic and architectural significance of the building. Appropriate microgeneration projects such as hidden or disguised solar panels may provide the necessary

¹²³ Ibid.

¹²⁴ Solar Trade Association 'STA Scotland: key facts and statistics' (2016) <http://www.solar-trade.org.uk/wp-content/uploads/2016/03/Key-facts-and-statistics-Solar-in-Scotland-v8.pdf> See also Department for Business, Energy and Industrial Strategy 'Feed in tariff Statistics' https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/562991/FiT_LA_Domestic_Installations_Q3_2016_with_London.pdf

opportunity to keep the building suitable for active use, comfortable and affordable now and for future generations.

Analysis

Legal and policy presumptions and duties play an important role in determining sustainable development equations. Presumptions and duties can be used by Governments and others to ensure certain factors are taken into account by decision makers. In other words, presumptions and duties can ensure a factor is added to the 'wish list' in a particular sustainable development equation. The Scottish Government's imposition of legal duties on public bodies to contribute to sustainable economic growth¹²⁵ and, also, to take climate change calculations into account when exercising their functions¹²⁶ are examples of new obligations being imposed across government in an attempt to address new challenges. However, as new challenges present themselves and priorities change, it may not be enough to simply add addressing these challenges to the list of factors to be taken into account in decision making.

Indeed, presumptions and duties also are used to provide decision makers with a clear indication of the priority and weight to be afforded to the different factors in a given sustainable development equation. When new challenges present themselves, it may be necessary to go beyond simply adding obligations, and actually re-consider the priorities in specific sustainable development equations.

Thus, the status of a particular presumption or duty and its place relative to other presumptions and duties in a specific sustainable development equation is important. A hierarchy exists in relation to the form and wording of duties and presumptions and this provides a useful template for decision makers. Primary obligations have priority but this may be tempered by secondary factors. Where the secondary duty is set out within the regulatory regime itself, courts and other decision makers must not only openly prioritise the primary obligation but consider ways of mitigating harm or optimizing benefits in relation to secondary obligations.

¹²⁵ Regulatory Reform (Scotland) Act 2014 s.4

¹²⁶ Climate Change (Scotland) Act 2009s.44

The recognition and subsequent consideration of impacts appears to be more difficult and in some cases non-existent where secondary presumptions and duties are not part of a regulatory regime per se but instead set out in general statutes. As discussed above, in the context of listed buildings cases, the courts have overwhelmingly given more weight to legal presumption in favour of preservation set out in LBCASA 1997 than to any of these more general duties, relating to climate change or sustainable development set out elsewhere. To this end, the case law has done little to actively promote sustainable management in listed buildings and calls into question the capacity of generally applicable duties and presumptions to actually influence the legal parameters of decision making within particular regulatory regimes. It appears that to have any chance of doing so, in the context of listed buildings, balancing obligations need to explicitly set out in the relevant regulatory regime itself. Moreover, while public bodies are conscious of their obligations under generally applicable statutes, the inconsistency present in listed buildings policy and practice is evidence that they are unsure about how these obligations fit with their specific roles and duties under the specific listed buildings regime.

As such, in the context of the listed buildings regime a case can be made for the introduction of secondary (balancing) obligations into the regime itself. Sustainable development is a poor champion for any of its component parts whether that is poverty alleviation, environmental protection, encouraging renewable energy or preserving the cultural heritage¹²⁷ and it is essential that the LBCASA 1997 regime continues to champion of the historic environment and likewise HES's main purpose continues to reflect this. However, an explicit secondary duty relating to sustainable development or sustainable management could be added to the decision-making processes for listed building consents and for planning applications affecting listed buildings under the LBCASA 1997. The existing primary duty to 'have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest' would remain and a secondary duty added that explicitly permits the consideration of important factors in the sustainable development equation. Likewise, HES' general purpose and functions could be redrafted to crystallise existing policy and include sustainable management objective. The Scottish Environment Protection Agency (SEPA) established in 1995 recently was given a fresh (and arguably its first) statutory purpose. SEPA now has a clear primary purpose of protecting and improving the environment and secondary

¹²⁷ Ross above n.5 at 1105.

duties relating to health and sustainable economic growth. It would be consistent for HES to have its primary purpose more explicitly set out and qualified by a similar secondary obligation linked to sustainable management.¹²⁸

These changes would encourage and actually create expectations that sustainable solutions be sought out and used. It would also mean the courts and local authorities would need to expressly acknowledge and consider the role of sustainable management in decision-making.

As generally applicable presumptions and duties are usually imposed on certain public bodies rather than regulatory regimes, this study has shown them to be more influential in the context of policy making and to some extent practice. Public bodies often need to report on how they have made or plan to make these balancing obligations operational. As observed in the context of listed buildings, the Scottish Government, HES and local authorities do address these balancing obligations in their policy however the extent to which this policy is useful varies significantly. These bodies still must operate within the very narrow parameters of the law on listed buildings and local authorities, in particular, are very unsure about introducing references to climate change mitigation or sustainable management.

At the moment, the policy on managing change in listed buildings is inconsistent and much of it is inhibiting their sustainable management. Some policy is very negative about change, some is positive but rather vague while some is not only positive but provides detailed advice on what is and what is not acceptable. This detailed policy appears to be appreciated by authorities making decisions and by potential developers as it adds some certainty to a discretionary process. The case study on LBC applications relating to solar panels found that more applications came forward where either the development plan policy was more positive about microgeneration or where the authority had a track record of granting consent. Potential developers like to know exactly what is and is not acceptable. Moreover, authorities were more likely to grant LBC where they could show that the application was in line with detailed prescriptive guidance.

¹²⁸ Environment Act 1995 s.20A (as amended by RRSA 2014).

Law and policy make different contributions to regulatory regimes and their sustainable development equations. While law sets the parameters for legal decisions, it is policy that provides the detailed guidance on what those decisions could or should look like in practice. This is particularly important where new obligations are introduced that do not neatly sit against more entrenched obligations.

There already exists plenty of sensible, clear and detailed guidance on micro-renewables projects in listed buildings in Scotland, notably, published by HES in their HESMG and in the Glasgow and Edinburgh development plans. The Scottish Government in an independent review of the planning system and in a subsequent consultation paper has been examining the role, status and content of both national policy and development plans. Proposals include giving national policy a stronger statutory status and streamlining planning guidance on specific types of development.¹²⁹ This paper contributes to these discussions by providing evidence that detailed policy setting out what is and what is not acceptable in any given sustainable development equation (in this case, for the sustainable management of listed buildings) is needed and valued not only by decision makers but also by potential developers. Whether the detail ends up in national or local policy is a political decision. However, if this detail was contained in higher status policy it would provide additional certainty in decision-making. Moreover, this guidance needs to be broadly consistent across Scotland, applied systematically by authorities and widely publicised so more owners and developers feel confident about submitting applications.

Conclusion

The world is changing and as new challenges present themselves, they need to fit into our decision-making processes and receive an appropriate amount of priority. Overtime the interests we perceive as important may change and their relative importance to one another change. Presumptions and duties are useful tools for ensuring the correct interests are brought into the sustainable development equation and given the appropriate status. While generally applicable presumptions and duties, and all encompassing, broad policies offer increase flexibility and perhaps have a longer shelf life, they are of limited value if they are creating

¹²⁹ Scottish Government, above n.49, paras 1.25, 1.30.

uncertainty and the stifling innovation needed in modern society. To be genuinely accepted and used presumptions and duties need to somehow become an express part of the sustainable development equations in specific regulatory regimes. This may in some cases require introducing them into individual regimes. Moreover, to make a true impact, the policy that supports these sustainable development equations needs be sufficiently detailed to provide those applying and subject to the regime with reassurance and certainty.